



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

April 23, 2003

Ms. Traci S. Briggs  
Assistant City Attorney  
City of Killeen  
101 North College  
Killeen, Texas 76541

OR2003-2720

Dear Ms. Briggs:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179869.

The Killeen Police Department (the "department") received a request for the "complete personnel file" of a named police officer. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information includes a "Texas Peace Officers Accident Report." Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses statutory confidentiality provisions. Section 550.065(b) of the Transportation Code states that it "applies only to information that is held by the [Department of Public Safety] or another governmental entity and relates to a motor vehicle accident reported under [chapter 552] or Section 601.004 [of the Transportation Code.]" This section states that, except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for release of accident reports to a person who provides two of the following three pieces of information: (1) the date of the accident, (2) the name of any person involved in the accident, and (3) the specific location of the accident. *See* Transp. Code § 550.065(c)(4). Under this provision, a governmental entity is required to release a copy of an accident report to a person who provides two or more pieces of information specified by the statute. *Id.* In the situation at hand, the requestor has not provided the department with two of the three pieces of information. Thus, the report is confidential under section 550.065 and must be withheld pursuant to section 552.101.

Because of our ruling on this issue, we need not address your arguments regarding section 552.130.

We next address your claim regarding section 552.103 of the Government Code as it is the broadest of the exceptions you claim. This section provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated *on the date that the requestor applies to the officer for public information for access to or duplication of the information.*

Gov't Code § 552.103(a), (c) (emphasis added). A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, a governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You state that the department received this request, which is dated January 29, 2003, on February 4, 2003. You have provided documentation reflecting that on February 6 a lawsuit was filed against the officer whose personnel file is at issue and state that the officer received a copy of the lawsuit on February 7 and was served process on February 10. Thus, you have not shown that the requested information relates to litigation that was pending on the date of the department's receipt of this request for information. *See* Gov't Code § 552.103(c). Furthermore, you admit that the department was unaware of the suit on the date it received this request; you do not contend, nor have you provided concrete evidence showing, that the department reasonably anticipated a lawsuit on the date that it received this request. *Id.*; *see also* Open Records Decision No. 452 at 5 (1986). Thus, you have not demonstrated that the requested information is excepted from disclosure under section 552.103 of the Government Code, and it may not be withheld on that basis.

You also contend that a portion of the submitted information is confidential. As noted above, section 552.101 of the Government Code excepts from disclosure information deemed confidential by other statutes, including section 143.089 of the Local Government Code. We understand that the City of Killeen has adopted chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a police officer's civil service file that a city's civil service commission is required to maintain, and an internal file that a police department may maintain for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a police department takes disciplinary action against a police officer, it is required by section 143.089(a)(2) to place records relating to the investigation and disciplinary action in the officer's civil service file maintained under section 143.089(a). Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See Id.* §§ 143.051-.055. Such records are subject to release under chapter 552 of the Government Code. *See Id.* § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, a document relating to an officer's alleged misconduct may not be placed in his civil service personnel file if there is insufficient evidence to sustain the charge of misconduct. Local Gov't Code § 143.089(b). Information that reasonably relates to an officer's employment relationship with the police department and that is maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You indicate that a portion of the submitted information is maintained in the department's internal personnel file concerning the named officer. We agree that the information kept in this file is confidential pursuant to section 143.089(g) and must therefore be withheld in accordance with section 552.101 of the Government Code.

In addition, you assert that other information concerning the officer must be redacted pursuant to section 552.117(2) of the Government Code. Section 552.117(2) excepts from

disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of a peace officer regardless of whether the officer requests confidentiality under section 552.024.<sup>1</sup> You indicate that the individual at issue was a licensed peace officer on the date the department received this request. Therefore, we agree that, under section 552.117, the department must withhold the listed information concerning this individual. We have marked the types of information that the department must withhold.

Finally, we note that the submitted information includes a photograph of the named officer. Section 552.119 excepts from public disclosure a photograph of a peace officer that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. Gov't Code § 552.119(a)(1)-(3). This section also provides that a photograph made exempt from disclosure by this section may be made public only if the peace officer gives written consent to the disclosure. *Id.* § 552.119(b); *see also* Open Records Decision No. 502 (1988). The submitted photograph depicts a peace officer, and it does not appear that any of the exceptions are applicable. You have not informed us that the peace officer has executed a written consent to disclosure. Accordingly, the department must withhold this photograph.

In summary, the submitted "Texas Peace Officers Accident Report" must be withheld under section 552.101 in conjunction with chapter 550 of the Transportation Code. In addition, pursuant to section 552.101 and section 143.089(g), the department must withhold the submitted information that is maintained in the department's internal personnel file concerning this officer. We have also marked the types of information that the department must withhold pursuant to sections 552.117(2) and 552.119. All other submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

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<sup>1</sup>"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

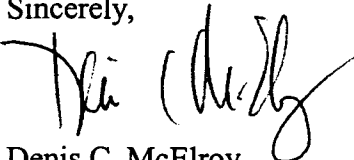
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/lmt

Ref: ID# 179869

Enc. Submitted documents

c: Mr. David Fernandez, Jr.  
P. O. Box 5120  
Temple, Texas 76505-5120  
(w/o enclosures)